Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

ALEX P. MITCHELL,

Petitioner,

THE NEW YORK BLOOD CENTER
and 1199 NATIONAL HEALTH AND
HUMAN SERVICE EMPLOYEES
UNION, SEIU, AFL-CIO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Second Circuit's preclusion of the evidence of the discriminatory animus of the managerial employees of the New York Blood Center who initiated the termination of Mitchell's employment on the ground that the influence of the said managerial employees on the ultimate decision to terminate Mitchell was attenuated, conflicts with the decisions of other circuit courts of appeal that hold a jury may find that a racial taint at any step in the adverse employment decision is sufficient to hold the employer liable for employment discrimination?

Whether the Second Circuit's preclusion of the evidence of the discriminatory statements and conduct of the managerial employees of the New York Blood Center over a period of eight years conflicts with the decisions of other circuit courts of appeal that hold a jury may find that such evidence shows a corporate state-of-mind sufficient to hold the employer liable for employment discrimination?

PARTIES TO THE PROCEEDING

Petitioner

Alex P. Mitchell

Respondents

The New York Blood Center and 1199 National Health and Human Service Employees Union, AFL-CIO.

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The opinion of the United States Court of Appeals for the Second Circuit is an unpublished opinion. A copy of the opinion is included in the Appendix at Appendix A at 1a-9a.

A copy of the Court of Appeals order that denied rehearing is included in the Appendix at Appendix B at 10a-11a.

The memorandum, decision, and order of the district court, which is also unpublished, is included in the Appendix at Appendix C at 12a-13a.

JURISDICTION

The United States Court of Appeals for the Second Circuit filed its Opinion on August 24, 2000. The Court of Appeals filed its order that denied a timely Petition for Rehearing and Suggestion for Rehearing En Banc on January 5, 2000 (App. B). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1866, 42 U.S.C. § 1981

All persons within the jurisdiction of the United

States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes licenses, and exactions of every kind, and to no other.

The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

The Petitioner herein, Alex P. Mitchell (hereinafter Mitchell) and John Akinrele (hereinafter Akinrele), commenced this action in the United States District Court for the Eastern District of New York against the Respondent New York Blood Center (hereinafter NYBC) on November 7, 1994, pursuant to: the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5 et seq. (Title VII) and the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981 et seq. (§ 1981). On August 20, 1996, Mitchell and Akinrele filed an amended complaint that alleged a pattern and practice of discrimination by the NYBC and that included the Respondent 1199 National Health and Human Service Employees Union, AFL-CIO (hereinafter 1199 or the union) as a party to the action.

The amended complaint alleged that 1199 acquiesced to the discrimination by the NYBC in violation of § 1981, Title VII, the NYSHRL, and the National Labor Relations Act, 29 U.S.C. § 151 et seq.. Mitchell and Akinrele invoked the jurisdiction of the district court pursuant 28 U.S.C. § 1331 (general federal question jurisdiction); § 1343(3) (jurisdiction to redress deprivation of rights guaranteed by any Act of Congress); and § 1343(4) (to recover damages or secure equitable relief under any Act of Congress providing for the protection of civil rights).

After the completion of discovery, the defendants sought summary judgment dismissing all of the claims of Mitchell and Akinrele. Mitchell and Akinrele opposed the motions. The district court denied the defendants' motions with respect to Mitchell and granted same with respect to Akinrele. Mitchell's claims proceeded to trial before a jury. Mitchell was the only witness permitted

to testify. After Mitchell rested, the defendants sought and obtained judgment as a matter of law that dismissed Mitchell's complaint with prejudice and with costs. The court of appeals affirmed the judgment of the district court and later denied a petition for rehearing. App. A at 1a-9a, App. B at 10a-11a.

The Exclusion of Relevant, Probative Testimonial Evidence of Discrimination

Prior to the trial, the defendants' filed motions in limine, that sought to preclude all of Mitchell's evidence that tended to show that a discriminatory motive, more likely that not, motivated the NYBC to discharge Mitchell or that the reasons given by the NYBC were not true and that discrimination was the real reason for its actions. Over Mitchell's objections the motions were granted. The excluded evidence consisted of the testimony of John Akinrele, James Cole, and Rase Denny who are all former employees of the NYBC and documentary evidence that showed that Caucasian employees of the NYBC engaged in acts of insubordination and/or misconduct and were treated much more favorably than Mitchell.

John Akinrele's Proffered Testimony

John Akinrele (hereinafter Akinrele) was Mitchell's co-plaintiff in this action whose claims against the defendants were dismissed Akinrele, who is a naturalized citizen of the United States born in Nigeria, worked in the fractionation department at the NYBC from 1988 to 1994. The fractionation department was headed by Gary Swan. Akinrele was prepared to testify

that from the commencement of his employment he was subjected to continual acts of discrimination including, but not limited to:

He received the worst and the most physically demanding job assignments;

He was subjected to assault;

When he was assigned to remove blood plasma from the conveyor belt at the facility, sometimes a towel would pass through the conveyor belt with the letters "KKK" scrawled on it;

His company issued work boots sometimes had the letters KKK scrawled on them, other times the symbol for the Klu Klux Klan--a cone shaped hood with two small slits--was scrawled on the boots, other times his boots were filled with blood plasma or other liquids;

He was regularly referred to by names such as nigger, porch monkey, KKK, and Zulu by other plasma operators and supervisors such as Gary Swan, Glen Musano, and George Bulter;

In or about 1985 Akinrele reported these incidents to a supervisor at the NYBC, Rase Denny, who is of African descent, and upon information and belief, Denny reported the incidents to Gary Swan. Nothing was done;

In February 1987, Akinrele was promoted to the position of fractionation technician. Shortly after the promotion, Akinrele found letters "HNIC" written in black ink on his locker in the men's bathroom at the NYBC. Each letter was approximately ten inches in length. Akinrele did not know what these letters meant until the aforementioned Rase Denny told him the letters were an abbreviation for the phrase "Head Nigger In Charge;"

Akinrele complained about the terrible racial atmosphere at the NYBC to supervisors such as Swan, Rase Denny, and Jim Velez, to no avail.

Akinrele proffered testify that Clarke, the NYBC's facilities manager failed and refused to hire any people of African descent in the engineering department. In or about 1987, Akinrele spoke with Clarke about his refusal to hire Akinrele's cousin, Emmanuel Ekpeyong who is of African descent, for a position in Clarke's department. Clarke told Akinrele that he was not going to hire any blacks in the engineering department.

In or about December 1989, Akinrele confronted Clarke about his refusal to hire James Cole, a NYBC employee of African descent who had just been rejected for a position in Clarke's department. Cole was present when Akinrele confronted Clarke. Clarke told Akinrele that he (Clarke) did not have to hire any blacks in his department. Akinrele asserted that the NYBC had affirmative action obligations and that Clarke must integrate his department. Clarke responded that he could comply with his affirmative action obligations by

hiring women or other minorities, he did not have to hire any blacks.

Akinrele proffered testimony that no person of African descent worked in Clarke's department at the NYBC during the almost twelve years that Akinrele worked at there, except for approximately two weeks in the mid-1980s. Akinrele would testify that on several occasions he spoke with Amper, the NYBC's human resources manager, about the fact that Clarke's staff was all white and that Amper did nothing.

Finally, Akinrele proffered testimony that on November 21, 1990 he was subjected to an assault at the NYBC by John Healy (hereinafter Healy), a plasma operator, and Gary Billingham (hereinafter Billingham), a supervisor who was on duty. Both Healy and Billingham are Caucasian. Although employees at the NYBC were told by management that fighting was a terminating offense, Healy was suspended for five days and Billingham received a warning letter.

Akinrele believed the assault was racial and he forwarded a written account of same to Linda Amper in the human resources department who responded that the assault was not racial. She stated that Billingham was attempting to break up the fight. Akinrele told Amper that he was not satisfied with her conclusion because no investigation of the incident had occurred, no witnesses had been interviewed, and there was no "fight." He told Amper he was the victim of an unprovoked assault and that if Healy or Billingham had been black, a proper investigation would have occurred and both Healy and Billingham would have been fired. The incident was not investigated until late in 1992 by Patrick Sheil, the vice president of the human resources department. By letter dated November 25, 1992, Sheil stated that he conducted an investigation of the incident

and found that there was no racial motivation behind the assaults.

James Cole's Proffered Testimony

James Cole (hereinafter Cole), worked in the fractionation department at the NYBC from 1989 to 1994. Cole's testimony would corroborate the conversation that Akinrele had with Clarke in December 1989 after Cole was rejected for a position in Clarke's department. Cole would testify that Clarke told Akinrele that Clarke did not have to hire any blacks in his department and that he could comply with his affirmative action obligations by hiring a woman or other minorities, he did not have to hire any blacks. Cole would also testify that no person of African descent worked in Clarke's department during the five years that Cole worked at the NYBC.

Cole also proffered testimony that throughout his tenure at the NYBC, Clarke would not permit him to "hang out" in the engineering department at the facility. Cole had to visit the engineering department on a regular basis to report malfunctions of the equipment in the fractionation department. If Clarke observed Cole in the department for any extended period of time or speaking with an employee of the engineering department for any length of time, Clarke would tell Cole that he could not hang out in the engineering department, Cole was only permitted there to discuss the operations of the NYBC.

However, Caucasian employees from the fractionation department routinely "hung out" in the engineering department; they often enjoyed their lunch breaks in the engineering department and mingled with the employees in the engineering department in Clarke's

presence. Clarke never told the Caucasian employees from the fractionation department that they could not hang out in the engineering department.

Rase Denny's Proffered Testimony

Rase Denny (hereinafter Denny), worked in the fractionation department at the NYBC from 1978 to 1988. Denny is of African descent. During his employment at the NYBC, he always reported to Gary Swan.

Denny would corroborate Akinrele's testimony regarding the multiple acts of discrimination to which Akinrele was subjected and Swan's failure to address same. Specifically, Denny would testify that in or about September 1985, Akinrele showed him a pair of his company work boots that had the letters "KKK" written on them. Denny took the boots to Swan at Swan's office at the NYBC. Swan promised to conduct an investigation regarding the matter, however, no investigation was ever conducted. Denny had to provide Akinrele with boots on many occasions because Akinrele's boots were hidden from him, or they were filled with plasma or some other form of precipitate.

Denny would also testify that in 1987, after Akinrele was promoted to the position of fractionation Technician, Akinrele complained to Denny that the letters "HNIC" were scrawled on Akinrele's locker. Denny saw the graffiti and reported the incident to Swan. Swan asked Denny what the letters meant. Denny told Swan the letters are an abbreviation of the phrase "Head Nigger in Charge." Swan did nothing about the incident.

Denny would also testify that in early 1988, he had a meeting with Swan. At that the time of the

meeting, Denny held the position of Assistant Manager of Operations and as such he managed the supervisors, all of the fractionation technicians, and all of the plasma operators at NYBC. Swan told Denny that the NYBC was closing and reorganizing and that all of the supervisor positions were eliminated. Swan further stated that when the NYBC reopened, Denny would be one of the first persons that would be recalled.

Thereafter, Denny was laid off by Swan, along with Tony Algarin and Jim Velez. Denny, Algarin, and Velez were the only three supervisors who were laid off. They were also the only three supervisors who were not Caucasian. None of the Caucasian supervisors, all of whom had less seniority than Denny, Algarin, and Velez were laid off. Denny, Algarin, and Velez were never recalled to their positions. Caucasian fractionation technicians that Denny, Algarin, and Velez supervised until their lay-off, became supervisors at the NYBC.

The Exclusion of Relevant, Probative Documentary Evidence of Discrimination

Mitchell proffered the disciplinary records of several Caucasian NYBC employees. He proffered the records of Lisa Pyros who had a long disciplinary history at the NYBC that included several acts of insubordination; evidence that she had been disciplined on numerous occasions by various supervisors at the NYBC including Gary Swan for conduct including, but not limited to: excessive absenteeism; excessive lateness; abuse of sick time; sleeping on duty; verbal and outburst and damaging NYBC equipment; poor work performance; and receiving numerous phone calls at work.

On July 17, 1984, Pyros was terminated from her

employment at the fractionation department at the NYBC for refusing to report to work. In December 1985 she was reinstated to her position as a fractionation technician as a result of an arbitral award. Upon her return to the NYBC, Pyros continued to make contributions to her disciplinary record. In about June 1986 used loud, foul, and abusive language toward her supervisor and disrupted her department for two and one-half hours. Pyros was counseled to handle misunderstandings with her supervisor in a more professional manner in the future.

In June 1986, Pyros received a written counseling notice for excessive lateness; in September 1988, she received a written counseling notice because she failed to perform her duties. In or about August 1989, Pyros was promoted to the position of supervisor. She was one of the Caucasian employees of the NYBC who was promoted after all of the non-Caucasian employees were laid off. Pyros was Mitchell's supervisor at the time of his discharge from the NYBC (JA 1073). In April 1991, Pyros received a written warning from Gary Swan for looking at a personal document concerning another employee and discussing the document with other employees. In July 1992, she received a written warning because she failed to perform her duties, resulting in a loss to the company and necessitating additional overtime to complete a project.

Mitchell proffered the disciplinary records of Robert Knape (hereinafter Knape), another Caucasian fractionation technician. In March 1986, Knape received a written warning for splashing a plasma contaminated glove filled with water into the face of another technician, thus creating a dangerous condition. In February 1988 and August 22, 1988 he

received a written warning for poor job performance. In May 1989 he received a written warning for insubordination for refusing to remain at work to help out during a breakdown at the NYBC which occurred when the facility had a shortage of operators. In November 1989 Knape received a written warning because he failed to perform his job duties, which caused a risk of serious injury. The following year, in December 1990, Knape was promoted to the position of senior fractionation technician. In April 1992, Knape received a written warning for gross insubordination for failing to follow the direct order of his supervisor to correct a violation of a FDA rule and for leaving his shift early.

Mitchell also proffered the disciplinary records of John Healy and Gary Billingham who in November 1990 assaulted Akinrele and received a four days suspension and Billingham received a written warning, respectively.

Finally, Mitchell proffered the disciplinary records of Kevin Strumpf, a probationary employee at the NYBC, who in January 1992, refused to comply with the order of his supervisor, Russ Clarke, to put on his engineering uniform. Strump was suspended for five days.

The Trial of this Action

Mitchell testified that he is of African descent; he was born in the country of Barbados; and he has resided in the United States since 1972. He commenced his employment at the NYBC in January 1988 as a plasma operator in the fractionation department. Approximately sixty to eighty people worked in that department which was headed by Gary Swan (hereinafter Swan), the Director of the NYBC, who is Caucasian. Mitchell's responsibilities were to remove

plasma from plasma bags. The work was dangerous because it involved handling hazardous materials. Operators used special equipment: boots, jumpsuits, aprons, eye protection, and ear and hair protection. Mitchell became a member of 1199 at or about the time he commenced his employment with the NYBC.

In 1989 Mitchell was promoted twice, first to the position of senior plasma operator and then to the position of fractionation technician. At all times relevant he worked the 3:30 p.m. to 11:30 p.m. shift. Throughout his employment Mitchell received good evaluations and he had no disciplinary problems. He was an active member of 1199, in or about the fall of 1989 he was elected as a delegate of the union.

Mitchell testified about the racial discrimination and harassment that he was subjected to by Russ Clarke (hereinafter Clarke), the facilities manager and the manager of the engineering department at the NYBC. Clarke is Caucasian. Mitchell testified that in or about January or February 1992 he had a confrontation with Clarke. Mitchell testified that he observed white employees from his department, such as Bob Pease and Rich Morgan, travel through the engineering department as a short cut to the fractionation department. After observing the white employees use the short cut, Mitchell used the short cut on three occasions. On the first two occasions that he used the short cut, Clarke was not in the engineering department.

The third time Mitchell attempted to use the short cut, Clarke was present. Clarke stopped Mitchell and told him that he should not walk through the engineering department because things were stolen. Mitchell believed that Clarke was accusing him of stealing because of Clarke's tone of voice and aggressive nature. No white employee was stopped in the

engineering department.

Mitchell testified that Swan was present during the encounter. Mitchell told Swan that Clarke accused him of stealing and that he resented the fact that Clarke stopped only him and that everyone else could go in the engineering department and hang out. Swan did not respond. In his frustration, Mitchell called Swan a racist (JA 51-52). After this incident, Mitchell did not travel through the engineering department because that was Clarke's department and Mitchell reasoned that Clarke had reign over his department. White employees from Mitchell's department continued to travel through the engineering department.

Mitchell also testified that Clarke singled out black employees when he required them to move their cars from the front parking lot of the NYBC. He testified that when white employees parked their cars in the front parking lot, Clarke did nothing; however, whenever Mitchell or Akinrele parked their cars in the front lot, Clarke ordered them to move their cars. Mitchell testified that in the beginning he simply moved his car; however, as he observed this pattern, he would point out to the supervisors that white employees also parked their car in the front lot. Only then would a general announcement be made that ordered the other employees to move their cars.

Mitchell testified that in or about March 1992 he spoke with Linda Amper (hereinafter Amper), the human resources manager at the NYBC, about the way that Clarke treated him and people "who looked like him." Mitchell specifically complained about how Clarke required black employees to move their car from the front parking lot. Amper promised to look into the matter but she did nothing. Mitchell also complained about Clarke's discrimination to supervisors at the

NYBC including Swan, Lisa Pyros, and Gary Billingham during grievances and the weekly departmental meetings held at the NYBC, to no avail.

Mitchell's Discharge from the NYBC

The NYBC facility that Mitchell worked at had two parking lots, one in front reserved for visitors and the handicapped, and a larger lot in the rear. On or about October 20, 1992, a memorandum was circulated which informed the NYBC employees that only authorized vehicles may park in the reserve parking and visitor spots in the front lot at the plant during the hours of 7:30 a.m. to 7:30 p.m.. Violators of the policy would have their cars towed. Mitchell was aware of the memorandum.

On Monday, October 26, 1992, Mitchell reported to work at the NYBC at 3:00 p.m.. He parked in a reserve parking spot in the front lot as he usually did if a parking space was available. At approximately 4:00 p.m. Mitchell was called to the training room at the facility by Clarke. Clarke directed Mitchell to move his car from the front lot.

Mitchell pointed out to Clarke that other employees were parked in the front lot. Mitchell also complained to Clarke that his car had been vandalized in the NYBC's rear parking lot. Clarke responded that Mitchell should report those problems to his insurance company. Mitchell told Clarke that he would have very high insurance premiums or no insurance if he did that. Clarke told Mitchell that if Mitchell did not move his car, he would have it towed because that was the company's policy.

Mitchell told Clarke that he had permission to move his car or to have it towed. Mitchell gave Clarke

the keys to the car and told Clarke he had to go back to work. Mitchell left Clarke and returned to work. When Mitchell returned to the fractionation department his supervisor, Lisa Pyros, announced that anyone whose car was parked out front had to move his car. Tom Wild and Lenny Stuto, two Caucasian fractionation technicians, moved their cars from the front parking lot.

Approximately ten minutes later, Clarke called Mitchell to the training room again. This second meeting was attended by Clarke, Swan, Rich Morgan, another fractionation technician, and Mitchell. Clarke told Mitchell to move his car and that if he did not move it, he would be suspended. Mitchell refused to move the car and Clarke suspended Mitchell.

Mitchell left the training room to report to his supervisor that he was suspended, to gather his personal belongings, and to remove his company uniform and boots and place them in the proper receptacles. As Mitchell was about to enter the bathroom to change his clothes, Mitchell saw Steve Wasserman (hereinafter Wasserman), the Vice President of the NYBC. Clarke, Swan and another gentlemen were with Wasserman. Mitchell asked Wasserman if Mitchell could speak with him. Wasserman responded by screaming into Mitchell's face--you ask me nothing, you are suspended because you refused to remove your car. Either Wasserman or Clarke said that if Mitchell did not leave the facility, the police would be called.

After this encounter, Mitchell went into the bathroom to change his clothes, then the cafeteria to retrieve his lunch that he brought from home. When Mitchell came out of the cafeteria, Wasserman and Clarke followed him. Somewhere during this chain of events Mitchell did say that the NYBC was a Hitler-type establishment or words to that effect.

As Mitchell was leaving the facility, his beeper went off. Mitchell went to the pay phone in the facility and contacted the person that beeped him. After Mitchell completed the call, Mitchell saw two Suffolk County police officers walking toward him. Mitchell left the facility.

The next day, Mitchell was at the offices of Proskauer Rose LLP in New York County in his capacity as a union delegate to participate in the negotiations regarding a new collective bargaining agreement between the NYBC and 1199. Angela Doyle, the Vice President of 1199, and Fredy Gonzalez, an 1199 organizer, announced at the commencement of the negotiations that the matter of Mitchell's suspension had been settled. Mitchell was told he could go back to work and that he should stay out of trouble. Mitchell returned to work at the NYBC the following day and the rest of the week.

After he successfully assisted in the negotiation of a new collective bargaining agreement, that was ratified on or about November 1, 1992, Mitchell learned that the NYBC was investigating the incident that occurred on October 26, 1992. Mitchell was not informed that his suspension had been lifted only for purposes of negotiation. Mitchell never saw the letter agreement between the NYBC and 1199, dated October 28, 1992, stating that the withdrawal of his suspension was temporary. As a result of the investigation, Mitchell was terminated from his employment at the NYBC for gross insubordination.

Mitchell had never been disciplined before by the NYBC. Mitchell testified that the NYBC had a progressive disciplinary policy and that no one had been terminated for insubordination. Offenses that were supposed to result in termination were fighting, sleeping

on the job, and job abandonment. Mitchell knew this because of information he received from other union delegates, conversations he had with union members who had been disciplined, and conversations with 1199 supervisors, organizers, and Vice President Angela Doyle.

Mitchell's Arbitration Hearing

In December 1992, Mitchell requested that 1199 file for arbitration concerning his discharge and he contacted the union on a continual basis regarding the status of his request. Mitchell met with the union's attorney who represented him at the arbitration on one occasion in March 1994 for less than five minutes. The attorney asked Mitchell, "What paperwork did he have?" Mitchell gave him documents that he thought were relevant to this matter (which were never returned to Mitchell). Mitchell had no further contact or conversation with the union attorney until the day of his arbitration hearing, which was not held until June 10, 1994, more than one and one-half years after his discharge from the NYBC.

At the commencement of the arbitration, there was confusion as to whether the hearing should proceed because of the union's delay in seeking arbitration. Clarke, Swan, Linda Amper (hereinafter Amper), the Human Resources Manager for the NYBC, and Mitchell testified at the arbitration hearing. The union's attorney asked no questions of any witnesses, he submitted no exhibits, and made no arguments on Mitchell's behalf. By opinion and award dated July 1, 1994, the American Arbitration Association upheld Mitchell's discharge from the NYBC. During the period between his discharge from the NYBC and his arbitration hearing, Mitchell

completed several applications for employment at 1199's union hall but all of his applications disappeared.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL.

The Second Circuit, citing McLee v. Chrysler Corp., 109 F. 3d 130, 137 (2d Cir. 1997) (JLO, ALK, DJ) (holding that allegations of bias against a supervisor who was not consulted about a termination decision "provide no basis for imputing to [the decision-maker] an invidious motivation for the discharge"), precluded Mitchell's evidence of the discriminatory animus of Clarke and Swan, the managerial employees of the New York Blood Center who caused the termination of Mitchell's employment. The Second Circuit reasoned that Clarke's and Swan's influence on the ultimate decision to terminate was attenuated. App. A at 7a.

The Second Circuit's holding conflicts with the decisions of other circuit courts of appeal that have adopted the "fruit of the poisonous tree" doctrine which holds that a jury may find that a racial taint at any step in the adverse employment decision is sufficient to hold the employer liable for employment discrimination. Roebuck v. Drexel University, 852 F. 2d 715 (3d Cir. 1988) (Third Circuit reversed grant of judgment notwithstanding the verdict to university that argued each step of tenure process was a de novo review).

In Dey v. Colt Construction & Development Co., 28 F. 3d 1446 (7th Cir. 1994) the Seventh Circuit Court of Appeals held that a plaintiff may avoid summary

judgment if she can prove that an employee with animus "provided factual information or other input that may have affected the adverse employment action." Id. at 1459 citing Shager v. Upjohn Co., 913 F. 2d 398, 405 (7th Cir. 1990) (even where the plaintiff's supervisor may not have passed along discriminatory animus to the ultimate decision maker, that animus tainted his assessment of the plaintiff's performance on which the decision maker did rely); Jardien v. Winston Network, Inc., 888 F. 2d 1151, 1155 (7th Cir. 1989) (relevant to jury's determination in age discrimination case that decisionmaker accepted input from supervisor who had discriminatory motive); Robinson v. PPG Indus. Inc., 23 F. 2d 1159, 1165-66 (7th Cir. 1994) (summary judgment improper where supervisor who allegedly made age related remarks participated in ranking the performance of company employees and in the eventual decision to terminate the plaintiff's employment); Gusman v. Unisys Corp., 986 F. 2d 1146, 1147 (7th Cir. 1993) (reasonable jurors could conclude that a supervisor intent on purging the workforce of older employees lied to his superiors about the quality of the plaintiff's job skills; Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F. 3d 1316, 1057 (8th Cir. 1994) (employers cannot escape responsibility for sex discrimination "when the facts on which the reviewers rely have been filtered by a manager determined to purge the labor force of women."); Kientzy v. McDonnell Douglas Corp., 990 F. 2d 1051, 1057 (8th Cir. 1993) (evidence sufficient to support sex discrimination claim where superior's discriminatory animus was reflected in the information he provided to the ultimate decisonmakers). See also Haas v. ADVO Sys., Inc., 168 F. 3d 732 (5th Cir. 1999); Griffin v. Washington Convention Center, 142 F. 3d 1308 (D.C. Cir. 1998).

These decisions recognize and reaffirm this Court's holdings that a Title VII plaintiff must usually rely on the cumulative weight of circumstantial evidence to prove the element of discriminatory motive. United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 176, 103 S. Ct. 1478 (1983). The Second Circuit's holding to the contrary should be reviewed by this Court to resolve the conflict among the circuit courts.

Similarly, this Court should review the Second Circuit's decision to preclude the evidence of the discriminatory statements and conduct of Clarke and Swan on the ground of remoteness. The Second Circuit cited its decision in Haskell v. Kaman Corp., 743 F. 2d 113, 120 (2d Cir. 1984) (holding that statements by the company's president over a period of fifteen years that referred to the age of some of employees should have been excluded). These decisions conflict with the decisions of other circuit courts of appeal that hold a jury may find that such evidence shows a corporate state-of-mind sufficient to hold the employer liable for employment discrimination.

In EEOC v. Manville Sales Corp., 27 F. 3d 1089, 1092-93 (5th Cir. 1994), cert. denied ___ U.S. ___, 115 S. Ct. 1252 (1995), the Fifth Circuit held:

> The long period of time over which the remarks were made does not suggest that the evidence is not relevant. To the contrary, the long time period may indicate a pattern of discriminatory comments and as such are directly relevant to showing the existence of discriminatory motive on the part of

> Manville. The amount of time that had passed since their utterance is only pertinent to the weight to be assigned the evidence. This decision is for the finder of fact alone.

Id. at 1094. See also Conway v. Electro Switch Corp., 825 F. 2d 593, 597 (1st Cir. 1987) (a corporate state-of-mind or a discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actors or time frame involved in the specific events that generated a claim of discriminatory treatment); Ross v. Buckeye Cellulose Corp., 980 F. 2d 648 (11th Cir. 1993) (fact that the managers made the alleged comments at another plant a "mere" three to five years before transferring to a new plant did not significantly undercut the probative value of the statements).

These decisions are also consistent with this Court's holding in United States Postal Service Bd. of Governors v. Aikens, supra, that a Title VII plaintiff must usually rely on the cumulative weight of circumstantial evidence to prove the element of discriminatory motive. Further, these decisions recognize that "an invidious discriminatory purpose may often be inferred from the totality of relevant facts." Washington v. Davis, 426 U.S. 229, 242 (1976).

The Second Circuit's decision has a particularly debilitating effect on the ability of plaintiffs to have their claims of employment discrimination to be heard and decided by juries. The decision precludes the plaintiff's proffer of relevant, probative evidence of discrimination and then permits the dismissal of the claims for lack of said evidence. Therefore, it is respectfully submitted that this Court should review the Second Circuit's

holding to resolve the conflict among the circuit courts.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

VALERIE A. HAWKINS, ESQ.
Counsel of Record
175 Fulton Avenue
Suite 306
Hempstead, New York 11550
(516) 292-0984

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1st day of November two thousand.

Present: HON. GUIDO CALABRESI,
HON. JOSE A. CABRANES,
HON. ROSEMARY S. POOLER,
Roseann B. Circuit Judges.

United States Court of Appeals
Filed
August 24, 2000
MacKechnie, Clerk
Second Circuit

ALEX P. MITCHELL and JOHN AKINRELE,

Plaintiffs-Appellants

- v - 99-9331

THE NEW YORK BLOOD CENTER and 1199 NATIONAL HEALTH AND HUMAN SERVICE EMPLOYEES UNION, AFL-CIO,

Defendants-Appellees.

For Appellants: VALERIE A. HAWKINS,
Hempstead, New York

For Appellee New York Blood Center:
AARON SCHINDEL, ESQ.
(David Siden, of counsel),
Proskauer Rose LLP
New York, NY

For Appellee 1199: GWYNNE A. WILCOX, ESQ.
(Daniel Engelstein,
Veronica Villanueva,
of counsel),
Levy, Ratner & Behroozi, P.C.

Appeal from the United States District Court for the Southern District of New York (Nina Gershon, Judge and Tucker Melancon, Visiting Judge (W.D.La.)).

UPON DUE CONSIDERATION WHEREOF, IT IS

ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and hereby is AFFIRMED.

Plaintiffs-Appellants Alex P. Mitchell ("Mitchell") and John Akinrele ("Akinrele") appeal from a final judgment of the district court in favor of defendants-appellees The New York Blood Center ("NYBC") and 1199 National Health and Human Service Employees Union, SEIU, AFL-CIO ("1199" or "the union"). Akinrele and Mitchell sued the NYBC and 1199 for alleged discrimination on the basis of their race under 42 U.S.C. §§ 1981 and 2000e (§ 1981 and Title VII respectively) and the New York States Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 et seq. The district court rejected Akinrele's claims on summary judgment and Mitchell's on a motion for judgment as a matter of law at the close of his case. Both plaintiffs now appeal. We affirm.

BACKGROUND

Akinrele and Mitchell were employees of the NYBC and members of 1199. Plaintiffs are of African descent; Akinrele from Nigeria, Mitchell from Barbados.

Akinrele was employed by the NYBC from 1982 until he was laid off upon the closing of the NYBC's Melville, Long Island facility in 1994. Akinrele claims that since 1982 he has been subjected to various incidents of racial harassment and disparate treatment in job assignments, promotion, hiring, and other terms and conditions of his employment. [Blue 8] Most of the alleged incidents occurred prior to 1985, with one occurring in 1987, two in 1990, and two in 1994. [Blue

9-10, 15-16] Akinrele brought suit on November 7, 1994.

The district court (Gershon, J.) granted summary judgment against Akinrele on all but two of his claims because they occurred prior to the 300-day statute of limitations for Title VII and to the three-year statute of limitations for § 1981 and the NYSHRL. [JA 1344] In so doing, it rejected Akinrele's attempt tot overcome his timeliness problem by establishing a continuing violation. It also gave summary judgment against Akinrele on his claims of that the NYBC had engaged in a "pattern or practice" of discrimination and that it had created a hostile work environment.[1] [JA 1345-46] Finally, the court denied Akinrele's two timely claims--that he was laid off and not rehired as a result of discrimination--holding that he failed to establish a prima facie case. [JA 1343-44, 1346-47] Akinrele now concedes that his lay-off was not discriminatory. [JA 1344] But he appeals the rejection of his rehiring claim and of his claims that the NYBC engaged in a "pattern or practice" of discrimination and created a hostile work environment. [Blue 56]

Mitchell began working at the NYBC in 1988. In addition to claiming that the NYBC engaged in a "pattern or practice" of discrimination, Mitchell also alleged that his employment was terminated as a result of discrimination. The circumstances surrounding his termination were the following: The Melville site of the NYBC had two parking lots, one in front reserved for

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[1] Mitchell had made an analogous claim, but withdrew it at a pretrial conference before Judge Gershon on April 15, 1999. [JA 1351-56]

visitors and the handicapped, and a larger lot in the rear, which, Mitchell, claimed, lacked adequate security. Mitchell, among other employees, often parked his car in the front lot in violation of company policy. In October of 1992, the NYBC sent a memo informing employees that if they parked their cars in the front lot, their cars would be towed. [JA 779, 1386] On October 26, 1992, Mitchell parked his car in the front lot. Facilities manager Russell Clarke summoned him from his work and asked him tho move the car. Also present at this meeting was supervisor Gary Swan. According to Mitchell, other, white, employees were parked in the front lot at the same time and had not been summoned. For that reason, and because of the back lot's poor security, he refused to move the car. He told Clarke that Clarke could move it if he wanted or have it towed, and gave Clarke the keys.

Clarke conferred with more senior executives and summoned Mitchell again. (In the interim, a general announcement to move from the front lot was made and at least one other car owner, who was white, did so.) Mitchell again refused to move his car. He was then suspended and asked to leave. He took his time doing so (without indicating that he would actually leave), and was finally escorted out by the police. [A 250-74]

Following this incident, Mitchell was terminated. He filed a grievance which the defendant union pursued through its regular procedures. These culminated in an arbitration decision finding the termination reasonable. [JA 791-801] Mitchell then brought this action against both the NYBC and 1199.

At trial, Mitchell sought to introduce (a) testimony demonstrating that Clarke and Swan were

biased, and (b) documentary evidence of disparate treatment in his termination. The district court (Melancon, J)[2] excluded both. After the plaintiff's case, the court granted the defendants' motion for judgment as a matter of law, finding that Mitchell had not met his burden of establishing a prima facie case of discrimination under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Mitchell asks us to review the denial on summary judgment of his "pattern or practice" claim, the exclusion of evidence, and judgment as a matter of law against him on his termination claim.

We affirm the district court with respect to both plaintiffs as to all issues before us.

DISCUSSION

As to the "pattern or practice" claim made by both plaintiffs, we affirm the judgment substantially for the reasons stated by Judge Gershon with respect to Akinrele's claims. [JA 1341-47] Similarly, as to Akinrele's hostile environment claim, we agree, again substantially for the reasons stated by Judge Gershon, that the acts that Akinrele claims constituted discrimination within the statute of limitations period are not sufficient to survive summary judgment. In addition, we agree with Judge Gershon that the "continuing violation" exception to the statute of limitations does not apply to these claims. We conclude that even if there were a continuing violation, it would have ended outside the limitations period. [Id.] At oral

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2 After summary judgment, Judge Melancon took over the case from Gershon.

argument, counsel for the appellants stated that Akinrele's claims on appeal included a challenge to summary judgment on his continuing violation claims." A continuing violation is not a claim per se, but a doctrine that permits a court to apply an exception to the statute of limitations when a plaintiff brings a discrimination claim based on incidents that fall outside the limitations period. See, e.g., Van Zant v. KLM Royal Dutch Airlines, 80 F. 3d 708 (2d Cir. 1996). Akinrele could--and did--argue that the exception applied here. Judge Gershon held that he could not avail himself of the continuing violation doctrine in order to overcome the statute of limitations, a judgment we affirm.

That leaves Mitchell's termination claims. As to those, it is a closer question whether the evidence presented by Mitchell, had it referred to current attitudes, could show that Clarke and Swan were so biased at the time of the firing that, even though they were not the ultimate decision-makers, they could have influenced the decision-makers and thereby have improperly affected Mitchell's dismissal. But, in holding that the district court acted well within its discretion to exclude this evidence, we do not need to decide whether in certain circumstances similar evidence that relates to attitudes of non-decision-makers at the time of a firing should be admitted. For, in the case before us, the testimony proffered concerns remote statements. And that remoteness in time, combined with the, at most, attenuated influence on the decision by the alleged biased persons, is certainly sufficient to justify the court's exercise of discretion. See Haskell v. Kaman Corp., 743 F. 2d 113, 120 (2d Cir. 1984) (holding that statements by the company's president over a period of fifteen years that referred to the age of some of employees should have been excluded); see also McLee

v. Chrysler Corp., 109 F. 3d 130, 137 (2d Cir. 1997) (JLO, ALK, DJ) (finding that allegations of bias against a supervisor who was not consulted about a termination decision "provide no basis for imputing to [the decision-maker] an invidious motivation for the discharge"); Legendre v. Chase Manhattan Bank, 1996 WL 514874, at *6 (S.D.N.Y. Sept. 10, 1996) (stating that alleged discriminatory remark made prior to the plaintiff's discharge was insufficient to establish an inference of discrimination without "competent evidence" that t he coordinator played a role in the plaintiff's discharge).

Similarly, we do not find an abuse of discretion in the district court's exclusion of documents detailing the the discipline of white employees of the NYBC. The difference between Mitchell's behavior and that of the employees disciplined in the proffered documents is significant enough that we cannot say that the court erred in finding the employees not similarly situated. See Shumway v. United Parcel Service, 118 F. 3d 60, 64 (2d 1997) (JML, JMcL, Chin) (stating that in order to be considered similarly situated, the employees used for comparison "must be similarly situated in all material respects").

Mitchell nonetheless claims that, even in the absence of such proof, he has shown enough evidence of discrimination in the termination to avoid judgment as a matter of law. But assuming arguendo that he made out a prima facie case of discrimination based on his claims that whites were not required to move their cars as frequently as blacks, Mitchell has proffered no evidence--sufficient to warrant jury consideration--that the reasons given by the defendant for his firing were pretextual. It is uncontested that he refused to move his car, that the confrontation involved high-level company executives, that it disrupted work for over an

hour, and the police were called when it appeared that Mitchell might not leave the premises. Where a non-pretextual explanation is given, a discrimination action will not lie. See McDonnell Douglas, 411 U.S. at 806.

Akinrele and Mitchell also sued 1199. Because on the facts before us, no action against 1199 could lie if there was no discrimination by NYBC, we affirm the district court's rejection of these claims as well.

CONCLUSION

We considered all of Akinrele's and Mitchell's contentions and find them to be without merit. The judgment of the district court is therefore AFFIRMED.

FOR THE COURT:
ROSEANN B. MacKECHNIE
COURT CLERK

by: /s/LUCILLE CARR

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
United States Courthouse
40 Foley Square
New York 10007

ROSEANN B. MacKECHNIE
CLERK

United States
Court of Appeals
Filed
January 5, 2001
Roseann B. MacKechnie, Clerk
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 5th day of January two thousand.

ALEX P. MITCHELL and JOHN AKINRELE,

Plaintiffs-Appellants

- v - 99-9331

THE NEW YORK BLOOD CENTER and 1199 NATIONAL HEALTH AND HUMAN SERVICE EMPLOYEES UNION, AFL-CIO,

10a

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Alex P. Mitchell and John Akinrele.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk

By: /s/
Beth J. Meador,
Administrative Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN DIVISION

Alex P. Mitchell — Civil Action No. 94-CV-5165

versus — Judge Tucker L. Melancon

The New York Blood Center
and 1199 National Health
and Human Service Employees
Union, SEIU, AFL-CIO

JUDGMENT

At the conclusion of plaintiff's case in chief for oral reasons assigned on the 24th day of September,

IT IS ORDERED that judgment be entered pursuant to Rule 50(a) of the Federal Rules of Civil procedure in favor of the defendants, The New York Blood Center
and 1199 National Health and Human Service Employees
Union, SEIU, AFL-CIO, and that plaintiff's claims against each defendant is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that the plaintiff is taxed with costs pursuant to Rule 54(d) of the Federal Rule of Civil Procedure.

This done and signed this 24th day of September, 1999 at Brooklyn, Louisiana.

/s/_____
Tucker L. Melancon
United States District Judge
Sitting by Designation